No. 22,104, A, B

United States Court of Appeals

For the Ninth Circuit

MIKE A. THOMAS, *Appellant*, vs. UNITED STATES OF AMERICA, *Appellee*.	No. 22,104-B
JOHN BECKER, *Appellant*, vs. UNITED STATES OF AMERICA, *Appellee*.	No. 22,104-A
EARL D. GREENE, *Appellant*, vs. UNITED STATES OF AMERICA, *Appellee*.	No. 22,104

Appeal from the United States District Court for the Northern District of California, Northern Division

BRIEF FOR APPELLEE

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Appeal from the United States District Court for the Northern District of California, Northern Division

BRIEF FOR APPELLEE

JURISDICTION

These are timely[1] appeals from judgments of con-

[1]Judgments were entered as to each appellant on May 12, 1967 and each appellant filed a notice of appeal pursuant to Rule 37(a)(2) F. R. Crim. P. on May 19, 1967.

viction in the United States District Court for the Northern District of California, Northern Division (now part of the Eastern District of California) for violations of Title 18 U.S.C. § 371 (Conspiracy—as to appellants Becker and Thomas); Title 26 U.S.C. § 5601(a)(1) (Possession of an Unregistered Distilling Apparatus—as to appellant Thomas); Title 26 U.S.C. § 5604(a)(1) (Sale Without Stamp of Distilled Spirits—as to appellants Becker, Thomas and Greene).

Jurisdiction in the District Court was based upon Title 18 U.S.C. § 3231. Jurisdiction in this Court is invoked under Title 28 U.S.C. § 1291.

STATEMENT OF THE CASE

Proceedings Below

By a four count indictment (Cr. No. 14748) filed on August 5, 1966, the appellants were charged as follows: Count I charged a violation of Title 18 U.S.C. § 371 (Conspiracy) against the appellants Thomas, Becker and Greene; Count II charged a violation of Title 26 U.S.C. § 5601(a)(1) (Possession of Unregistered Distilling Apparatus) against appellant Thomas; Count III charged a violation of Title 26 U.S.C. § 5604(a)(1) (Sale Without Stamp of Distilled Spirits) against appellants Becker and Greene; and Count IV charged a violation of Title 26 U.S.C. § 5604(a)(1) against the appellants Thomas and Becker. All appellants were arraigned and entered pleas of not guilty on September 14, 1966.

A jury trial was begun on February 28, 1967 before the Honorable Thomas J. MacBride, and on March 31, 1967 a verdict was returned by the jury finding appellants Becker and Thomas guilty on each count in which they were charged (i.e., Counts I, III, and IV as to Becker, and Counts I, II, and IV as to Thomas). Appellant Greene was acquitted on Count I and found guilty on Count III.

Post trial motions for judgments of acquittal and for a new trial under Rules 29 and 33, respectively, of the Federal Rules of Criminal Procedure were made by each appellant and denied by the Honorable Thomas J. MacBride on May 12, 1967. On the same date the appellants were sentenced as follows: Thomas was committed to the custody of the Attorney General for imprisonment for a period of 3 years on Counts I, II, and IV, the sentences to run concurrently. Becker was given an identical sentence as to Counts I, III, and IV. Greene was sentenced on Count III to a term of imprisonment for 3 years, the first 6 months to be spent in jail with the execution of the balance suspended and he was placed on probation for 5 years at the expiration of the jail term.

A stay of execution was granted as to each appellant and on May 19, 1967 each appellant was admitted to bail pending appeal.

Statement of the Facts

In September of 1962, Jack Courtney, a special investigator with the Alcohol and Tobacco Tax Division of the United States Treasury Department, assumed

the role of an undercover agent in an effort to penetrate an organization which was selling bootleg whiskey. In that guise he was introduced to appellants Becker and Thomas by an informer for the Oakland Police Department on September 5, 1962.[2] During the course of that meeting Becker and Thomas told Agent Courtney that if he wanted to deal with them he would have to be able to take delivery of 100 to 200 gallons a week. Courtney advised them he was in a position to accept whatever they could produce.[3] Later that same evening Becker took Agent Courtney to his home in Oakland where he gave Courtney a sample of their—i.e., Becker and Thomas'—bootleg whiskey.[4] The appellants Becker and Thomas also described their present still set-up to Agent Courtney at that time.[5]

On September 10, 1962, Agent Courtney purchased 8 gallons of illegal distilled spirits from Becker and Thomas.[6] As a result of the aforementioned activities of Agent Courtney, a still was located and raided on the property of appellant Thomas near Sacramento, California in October 1962[7] and Becker and Thomas were subsequently convicted for offenses similar to those charged in the instant indictment in the early part of 1963. Both appellants were sentenced to six

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[2]Reporter's Transcript, Vol. 3, pp. 664-666; Vol. 6, pp. 1731-1738.
[3]R.T., Vol. 3, p. 666.
[4]R.T., Vol. 3, pp. 667-668.
[5]R.T., Vol. 3, p. 669.
[6]R.T., Vol. 3, pp. 670-671.
[7]R.T., Vol. 3, pp. 672-673.

months in jail and were released from custody in approximately November 1963.

A few days after Becker was arrested in October 1962 Agent Courtney contacted him by phone while Becker was out on bail in an effort to determine whether his undercover identity had been compromised.[8] Becker manifested an unawareness of Courtney's true identity.[9]

Agent Courtney had no further contact with either Becker or Thomas until December of 1963 when he received a letter from Becker.[10] The letter from Becker to Courtney dated December 16, 1963 read as follows:

> "Dear Jack: Sorry I couldn't talk to you the last time you called, but I didn't want people to listen in on our conversation. I'm back in circulation now, and it's very important that I see you. Contact me at my office. I'm usually there from 8:00 a.m. to 7:00 p.m., six days. I'll enclose my card so you can contact me there. Like always, Johnnie."[11]

Becker had previously indicated to the Oakland Police Department informer in 1962 after the Sacramento still had been raided that he intended to continue the bootlegging venture when their then current problems subsided.[12]

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[8]R.T., Vol. 3, pp. 673 and 818 and 820.

[9]R.T., Vol. 3, p. 674.

[10]R.T., Vol. 3, p. 674 and Vol. 3, pp. 466-467, Defense Exhibit No. 3.

[11]R.T., Vol. 3, pp. 674-675, Defense Exhibit No. 3.

[12]R.T., Vol. 6, pp. 1737.

A business card of Becker's was enclosed in the aforedescribed letter and the phone call referred to therein related to the call from Agent Courtney to Becker in November 1962 when Courtney was attempting to determine if either Becker or Thomas was aware of his undercover identity.[13]

After receiving the letter of December 16, 1963, Agent Courtney called Becker and was advised by the appellant that it was very important for Becker and Thomas to meet with Courtney.[14] Thereafter, Courtney arranged to meet Becker and Thomas at the Hyatt House in San Jose, California on February 8, 1964.

At the meeting of February 8, 1964 Becker and Thomas informed the agent that they were going back into the bootlegging business and wanted to know if Courtney was still in a position to purchase their product in bulk quantities.[15] Becker and Thomas at that time indicated that they preferred to sell to one source only in order to reduce the risk of apprehension.[16] Additionally, they advised the undercover agent that he was to contact only Becker, that Thomas would be in charge of the still operation and to check periodically with Becker in order to ascertain how things were going.[17]

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[13]R.T., Vol. 3, p. 675.
[14]R.T., Vol. 3, p. 693.
[15]R.T., Vol. 3, pp. 694-695.
[16]R.T., Vol. 3, p. 695.
[17]R.T., Vol. 3, p. 696.

At a later meeting between the agent and Becker and Thomas at the Hilton Inn in San Bruno, California on May 27, 1964, the appellants indicated they were having some difficulty, expressed concern over the use of the telephone in their communications and devised a code to represent quantities of illicit spirits.[18]

In September 1964 Courtney received a letter from Becker (Government Exhibit C) in coded language indicating that a delivery of spirits was imminent.[19] In October 1964 the agent received another letter from Becker (Government Exhibit D) inquiring as to why he had not heard from Courtney and indicating in code that a delivery of spirits was waiting to be picked up.[20] A meeting was thereupon arranged in Richmond, California on October 22, 1964 and 10 gallons of illicit spirits were sold to Courtney for $100. At the aforesaid meeting Thomas told the agent that the delivery was less than expected because the individuals operating the still had "shorted" them.[21] Both Becker and Thomas remained silent as to where their still was located.[22]

On December 7, 1964 Agent Courtney received another letter from Becker (Government Exhibit F) wherein Becker indicated in code that another delivery of alcohol could be expected shortly.[23] During a

[18]R.T., Vol. 3, p. 697.
[19]R.T., Vol. 3, p. 700.
[20]R.T., Vol. 3, p. 703.
[21]R.T., Vol. 3, pp. 706-707.
[22]R.T., Vol. 3, p. 707.
[23]R.T., Vol. 8, p. 712.

phone conversation between Agent Courtney and Becker on January 6, 1965, Becker told Courtney that they were having difficulty because of flooding in Northern California and on January 11, 1965 told Courtney in a phone conversation that he needed a new still location since the old one had been washed out by the flooding of the Eel River.[24]

On March 3, 1965 the appellants Becker and Thomas met Courtney in Santa Rosa, California and sold him 35 gallons of illicit spirits for $450.[25] At that meeting Becker and Thomas asked the agent to find a ranch for them to set up their distillery. Courtney suggested a site in Nevada and the appellants agreed if he could find a suitable location for them.[26] On March 18, 1965 Courtney called Becker and advised him of a piece of Nevada property that the latter might be interested in for the purpose of setting up a distillery.[27]

Thereafter and on March 30, 1965, Agent Courtney met with Becker and Thomas at the Nugget Motel in Sparks, Nevada. At that meeting the aforementioned appellants advised Courtney that if they liked the proposed site they would move their still apparatus to Nevada.[28] After viewing the area, the appellants left Nevada and next met with the agent on April 8, 1965 at the Jack Tar Hotel in San Francisco.[29] At the

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[24]R.T., Vol. 8, p. 715.
[25]R.T., Vol. 8, pp. 721-722.
[26]R.T., Vol. 8, p. 723.
[27]R.T., Vol. 3, pp. 724-725.
[28]R.T., Vol. 3, p. 726.
[29]R.T., Vol. 3, pp. 727-728, 729.

meeting in San Francisco Agent Courtney was introduced to a Bill Jones by Becker and Thomas. Jones was introduced to the agent as the still operator for the proposed new location in Nevada.[30] On April 19, 1965 Thomas advised the agent that he had checked out the location in Nevada and that he did not like it since he had observed "too many vehicles with long antennas" in the area and also because he felt safer in California.[31]

On June 13, 1965 Agent Courtney called Becker and was advised by Becker that he and Thomas needed sugar and that their present still location was approximately 60 miles north of Fresno.[32] The question regarding the acquisition of sugar had come up before when the appellants asked the agent if he could procure sugar for them at less than the retail price.[33] The agent subsequently made available 2,000 pounds of sugar for use by the appellants.[34]

At a meeting between the appellants Becker and Thomas and the agent, Courtney, at the El Rancho Motel in Sacramento on July 28, 1965, the appellants became suspicious of Courtney's true identity, but the agent managed to assuage their suspicions.[35] At that same meeting Becker and Thomas for the first time described in some detail the description and location of their still site and advised Courtney that they had

[30]R.T., Vol. 3, p. 730.
[31]R.T., Vol. 3, pp. 731-732.
[32]R.T., Vol. 3, p. 752.
[33]R.T., Vol. 3, p. 753.
[34]R.T., Vol. 3, p. 753.
[35]R.T., Vol. 3, p. 754.

a new still operator, Bill Jones having elected not to become involved.[36] Again, in October of 1965, Becker, during the course of a phone conversation with Courtney, revealed additional information about the still location.[37] During the aforementioned period of time, agents were attempting to locate the exact location of the still being operated by Becker and Thomas.[38]

On March 8, 1966 Agent Courtney met the appellant Greene for the first time. This meeting took place at the Del Webb Hotel in San Francisco and the appellant Becker was also there. Greene advised Courtney that certain stolen United States Treasury bonds previously received by Courtney from Becker were originally obtained by him (i.e., Greene) from the person who had stolen them. Greene also advised the agent that he expected Courtney to fence the bonds for them and that from his share of the proceeds he (Greene) would set up an additional still and produce alcohol which would be turned over to Becker and Thomas for sale to Courtney.[39] Becker then told Agent Courtney that he expected that Courtney would "take care" of him and Thomas from Courtney's share of the bond proceeds.[40]

Courtney received a letter from Becker on April 11, 1966 wherein the latter again advised him that they needed sugar badly.[41] On April 24, 1966 Thomas

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[36]R.T., Vol. 3, p. 755.
[37]R.T., Vol. 3, p. 759.
[38]R.T., Vol. 3, p. 760.
[39]R.T., Vol. 3, p. 792.
[40]R.T., Vol. 3, p. 792.
[41]R.T., Vol. 3, pp. 797-798.

and Glenn Curtice picked up the load of sugar previously referred to in Fresno, California.[42] After receiving the sugar Becker and Curtice were surreptitiously followed by other agents back to a farm located near Ceres, California.[43]

On May 28, 1966 Courtney received a telegram from Becker (Government Exhibit K) in coded language indicating that a load of distilled spirits was ready for delivery to Courtney.[44] On June 1, 1966 Courtney called Becker from Reno, Nevada and advised him that he would pick up the alcohol in a few days. During the course of the conversation Becker told Courtney that 60 gallons were ready and that he (Courtney) would have to pay more than originally agreed. Courtney refused and Becker then agreed to the price as previously fixed.[45] After a number of other phone calls from Courtney to Becker, it was agreed that appellant Greene would meet with Agent Bertolani[46] in Sacramento and make delivery of the alcohol.[47] Since Greene and Agent Bertolani had not

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[42]R.T., Vol. 2, pp. 517-518.

[43]R.T., Vol. 2, pp. 353-354. The delivery of the requested sugar to the farm in April 1966 confirmed the agents' suspicion as to the then present location of the appellants' still site. R.T., Vol. 2, p. 364. Additionally, no arrests were made at that time because of the suspicion that other unknown individuals were involved in the conspiracy and a still lingering doubt as to the exact location of the still. R.T., Vol. 2, p. 366.

[44]R.T., Vol. 3, p. 801.

[45]R.T., Vol. 3, pp. 801-802.

[46]Agent Bertolani was known to the appellants as Bill Costa and had previously operated in an undercover capacity when the load of sugar was delivered to Thomas and Curtice in Fresno. R.T., Vol. 2, pp. 517-518.

[47]R.T., Vol. 3, pp. 803-804; Vol. 2, pp. 518-519.

met each other before, a recognition signal was devised.[48] On June 4, 1966, Greene delivered 60 gallons of distilled spirits to Bertolani in Sacramento. Bertolani then placed a call to Agent Courtney at Becker's place of employment in Richmond, California advising Courtney that the delivery had been effected. Courtney thereupon paid Becker $780. Almost simultaneously thereafter Bertolani placed Greene under arrest, Courtney arrested Becker, and the still site near Ceres, California was raided.[49] Before Becker was arrested and before Courtney had revealed his true identity, Becker requested Courtney to look for yet another still location since the present site could not accommodate his 300 gallon still apparatus.[50]

The appellants Becker and Thomas had admitted to the undercover agent as early as September 1962 that they had sold non-tax-paid alcohol to the public prior to meeting Courtney. They indicated, however, that they preferred one buyer.[51]

The testimony adduced at the trial of this case established, inter alia, that the undercover agent posed as an underworld figure in order to gain the confidence of the appellants Becker and Thomas who were attempting to locate a syndicate connection in order to sell their bootleg alcohol.[52] The still site in Nevada was obtained and offered to the appellants after they

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[48]R.T., Vol. 3, pp. 803-804; Vol. 2, pp. 518-519.
[49]R.T., Vol. 2, pp. 527-529; Vol. 3, pp. 805-806; and Vol. 1, p. 146.
[50]R.T., Vol. 3, p. 805.
[51]R.T., Vol. 3, pp. 825-826; Vol. 4, p. 1015; and Vol. 8, p. 2115.
[52]R.T., Vol. 3, pp. 831, 664-665; Vol. 6, pp. 1731-1738.

had specifically requested the agent to obtain one for them.[53] The sugar which was provided the appellants was provided only after their continued requests.[54] The appellants were to bear the ultimate cost of any items furnished them by deducting said cost from the purchase price of the alcohol.[55] The significant reasons for the lengthy investigation in this case were the failure of the Government to locate the still sites being operated by the appellants Becker and Thomas[56] and the caution exercised by the appellants in their dealings with the undercover agent.[57] With regard to an offer of a still apparatus, the agent testified that he told the appellants Becker and Thomas that he could make arrangements to have a still apparatus sent out from the East if theirs was not satisfactory. The offer was declined by the appellants on the ground that their own apparatus was more than adequate.[58] Although the agent knew the appellants were on probation in 1963 as a result of a previous conviction for bootlegging, it was the appellant Becker who first contacted Courtney in 1963 advising the undercover agent that he was "back in circulation now."[59] Appellant Thomas was the only participant in the conspiracy known to Glenn Curtice and aided the latter

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[53]R.T., Vol. 3, pp. 715 and 723.

[54]R.T., Vol. 3, pp. 752, 753, 797-798.

[55]R.T., Vol. 4, p. 1016.

[56]R.T., Vol. 4, pp. 1017-1019.

[57]R.T., Vol. 2, p. 341; Vol. 3, p. 754; Vol. 4, pp. 1023, 1032, and 1037-1038.

[58]R.T., Vol. 4, p. 1043.

[59]R.T., Vol. 3, pp. 674-675; Vol. 8, p. 2114; Defense Exhibit No. 3.

in constructing the still apparatus and supplied the raw material for construction of the stills.[60]

ARGUMENT

I. RESPONSE TO APPELLANT THOMAS' ARGUMENTS.

A. There Was No Entrapment As A Matter Of Law And The Court Did Not Err In Denying Thomas' Motion For Judgment Of Acquittal.

It is fundamental that where there is any conflict in the evidence, the defendant is entitled to the defense of entrapment as a matter of law only if he establishes it beyond a reasonable doubt. If not, the question must go to the jury. *Masciale v. United States,* 356 U.S. 386 (1958); *Matysek v. United States,* 321 F.2d 246 (9th Cir. 1963). Thomas argues that since the government undercover agent posed as a gangster, offered to furnish a still site and operator, furnished 2,000 pounds of sugar and only received 105 gallons of alcohol over a 2½ year period, entrapment existed as a matter of law. The evidence, however, indicated that the agent assumed the role of a syndicate contact because that is exactly what Thomas and Becker were looking for in order to sell their alcohol to one source.[61] Additionally, the proposed still site in Nevada was offered to the defendants only after they had specifically requested the agent to obtain one for them.[62] The sugar also was provided only

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[60]R.T., Vol. 1, p. 56.

[61]R.T., Vol. 3, pp. 666, 694-695; Vol. 4, pp. 1731-1738; and Vol. 3, p. 831.

[62]R.T., Vol. 3, pp. 715 and 723.

after continued urgings by the defendants.[63] Providing a defendant with the necessary and requested means to commit an offense is not in itself entrapment. *United States v. Roett,* 172 F.2d 379 (3rd Cir. 1949) cert. den., 336 U.S. 960 (1949).

With respect to the lengthy period of time which elapsed from the receipt of Becker's letter in December 1963 until the apprehension of the defendants in June 1966, the evidence established that Becker and Thomas were having difficulty with their still and its location (one of which had been flooded out by the overflow of the Eel River); the defendants exercised caution in dealing with the agent and at one time suspected his true identity; and at no time until just prior to the arrests in this case did the government know of the exact whereabouts of the still and its location.

Thomas also contends that there is no evidence that he was engaged in any criminal activity between December 16, 1963 and late fall 1964 (Thomas' Opening Brief, p. 14). The facts indicate, however, that Thomas along with Becker met with the agent at the Hyatt House in San Jose in February 1964 and made it known at that time that he intended to get back in the bootleg business. Furthermore, he again met with the agent and Becker at the Hilton Inn in San Bruno in May of 1964 and advised the agent at that time that he was having some difficulty in starting up the new operation and assisted in devising the code that

[63]R.T., Vol. 3, pp. 752, 753, 797-798.

was subsequently used in their communications.[64] Both of the above meetings being in furtherance of the conspiracy alleged and constituting "criminal activity."

There is much evidence in this case establishing that the government agents merely went along with the criminal plan of the defendants. The defense of entrapment is not established as a matter of law by simply showing that particular acts were committed at the instance of government officials. *Sorrells v. United States,* 287 U.S. 435 (1932). As this Court pointed out in *Matysek v. United States, supra,* at 248: "Relevant to the issue [of entrapment] is the predisposition and willingness of the accused to commit the crime and the criminal design of the accused." There was an abundance of evidence establishing predisposition and willingness on the part of Thomas in this case, including a prior conviction for bootlegging.

The incidents cited in regard to "fixing" judges, arranging for abortions and bribing probation officers are taken out of context and truncated in Appellants' Opening Brief. The evidence with respect to those events established that they were all initiated by Becker who urged the agent to accomplish the requested acts as personal favors.

One commentator has pointed out that the defense of entrapment may be dissected into four constituent

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[64]See note 18, supra; also see Government Exhibits C and D.

elements.[65] First, a government officer or agent must instigate the offense; second, government agents must perform acts constituting inducement; third, the inducements offered by the government must cause the defendant's conduct; and finally, the criminal design must not originate in the mind of the defendant.[66] It is submitted that as to the first element, the offenses in the instant case were instigated by Becker's letter to the agent of December 16, 1963. The acts of inducement performed by the government agent were not offensive per se and the defendant was not corrupted by any solicitations of the government. Cf. *Whiting v. United States,* 321 F.2d 72 (1st Cir. 1963), cert. den., 375 U.S. 884 (1963). As to the third element, the government submits that any inducements offered by the government were not sine qua nons of the defendant's conduct. He should not be heard to complain that he was entrapped if there was no showing that the crimes were causally related to the inducements. See *Lopez v. United States,* 373 U.S. 427 (1963); and *Accardi v. United States,* 257 F.2d 168 (5th Cir. 1958); cert. den., 358 U.S. 883 (1958). The evidence in the case indicated that at the time of the initial meeting with the agent at the Hyatt House in San Jose in February 1964, the defendants had "already formed a design to commit the crimes charged" and were willing to do so. *United States v. Becker,* 62 F.2d 1007, 1008 (2nd Cir. 1933).

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[65]Orfield, "The Defense of Entrapment in the Federal Courts," 67 Duke Law J. 39 (1967).

[66]67 Duke Law J. at 44-45.

In light of the above, the government submits that there was ample evidence from which the jury could have and did infer the requisite state of mind on the part of Thomas.

B. There Was No Prejudicial Error In Allowing Testimony Of Other Misconduct Against Thomas.

On October 12, 1965 the undercover agent received a letter from Becker (Government Exhibit I) which read in part:

> "Something else you might make a buck on, so give this some thought, and I'd like to know by the middle of next week, because that's when he will contact me again. Anyhow, the story is that he has $40,000 worth of Government bonds to dispose of, and I was thinking maybe Mexico would be a good spot for them. If it can be worked, let me know what the breakdown would be for him and for us. I'll be in touch with you again as soon as I hear from the Greek."[67]

Early in the trial while counsel for Thomas was cross-examining a government agent the following colloquy took place:

> Q. Did you find anything to indicate that (Thomas) is a member of any gang of any kind?
>
> A. Yes, sir.
>
> Q. What kind of gang; give us the time, the place and the date, Officer?
>
> A. Well, it has been my experience that he has been associated with Mr. Greene and the other, Mr. Becker, and the other Defendants in this case. This is the only one.

[67]"The Greek" was a sobriquet for Thomas; R.T., Vol. 3, p. 720.

Q. You say that your experience is that he has been associated with Mr. Greene?

A. Yes, sir.

Q. Therefore, that means that you ran a surveillance on Mr. Greene, to?

A. No, sir, it does not.

Q. Do you know anything at all about Mr. Greene?

A. Very little, sir.

Q. Know if he is a married man and resides in this community?

A. No, sir, I do not.

Q. Do you know if he has ever violated the law to your knowledge in his whole life?

A. Yes, sir.

Q. What did he do?

A. He was in possession of $50,000 worth of stolen United States Government Bonds.

Q. When was this?

A. This was in 1965, I believe.

Q. You believe. And you have a record on that; is that correct?

A. There is a record of that transaction.[68]

The Court thereafter gave a cautionary instruction on the above testimony.[69] However, testimony was later adduced by the government to the effect that a meeting was held on March 8, 1966 at the Del Webb Hotel in San Francisco at which the undercover agent, Becker and Greene were present. At this meeting Greene advised Courtney, the undercover agent, that he (Greene) had received the aforementioned

[68]R.T., Vol. 1, pp. 183-184.

[69]R.T., Vol. 1, pp. 239-240.

bonds from the person who had stolen them and that he had given them to Becker for transmittal to Courtney in order that the latter could "fence" the bonds for them. Moreover, Greene told Courtney that from his share of the proceeds he intended to set up a still, make alcohol and supply said alcohol to Becker and Thomas for delivery to Courtney. Becker acknowledged Greene's comments and stated that he expected Courtney to "take care" of Becker and Thomas from Courtney's share of the proceeds.[70]

The government contends that the above evidence was relevant and admissible against Thomas as showing another transaction in furtherance of the conspiracy. *Pinkerton v. United States,* 328 U.S. 640 (1946). However, even if it is assumed *arguendo* that the transaction regarding the stolen bonds (and the other evidence relating to misconduct) was not strictly in furtherance of the conspiracy, it was relevant to the intent and purpose of the defendants in engaging in the conspiracy—i.e., to acquire from whatever source possible additional funds to finance the bootleg operation. See, e.g., *United States v. Marchisio,* 344 F.2d 653, 667 (2nd Cir. 1965).

Additionally, the fact that Thomas was not present at the meeting between Courtney, Becker and Greene is immaterial since the declarations of one conspirator in furtherance of the objects of the conspiracy are admissible against his co-conspirators. *Carbo v. United States,* 314 F.2d 718, 735 (9th Cir. 1963).

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[70]R.T., Vol. 3, pp. 791-792, 781-782.

There was ample proof independent of the declarations of Becker and Greene that Thomas was connected with the conspiracy, e.g., the testimony of Courtney and Glenn Curtice.

With respect to stolen cigarettes and gold we invite the Court's attention to the fact that the testimony revealed that Thomas was present when those matters were discussed.[71]

The trial Court's rulings on the relevancy and admissibility of all the above evidence can be reviewed properly only if one considers the context in which those issues arose and in light of the defenses raised in this case and the direct testimony of the defendants Becker and Thomas.[72] It is respectfully submitted that the true test in each instance where evidence of other crimes or misconduct is offered is one of weighing the relevancy and value of the evidence against the danger of prejudice from its use, i.e., a calculus of relevancy. See: McCormick, *Evidence,* § 152 at 320 and especially § 157 at 331-332 (1954) where the author points out:

> "The second is that when the crime charged involves the element of knowledge, intent, or the like,[73] the state will often be permitted to show other crimes in rebuttal, after the issue has been sharpened by the defendant's giving evidence of

[71]R.T., Vol. 8, pp. 2168-2169, 2175-2178.

[72]See the trial Court's comments in ruling on the admissibility of this evidence at R.T., Vol. 8, pp. 2142-2143.

[73]This would seem to apply a fortiori where the defense of entrapment or coercion is raised and a searching inquiry into the state of mind of the defendant becomes imperative. Cf. *Sherman v. United States,* 356 U.S. 369 (1958).

accident or mistake, more readily than it would as part of its case in chief at a time when the court may be in doubt that any real dispute will appear on the issue.

"There is an important consideration in the practice as to the admission of evidence of other crimes which is little discussed in the opinions. This is the question of rule versus discretion. Most of the opinions ignore the problem and proceed on the assumption that the decision turns solely upon the ascertainment and application of a rule. If the situation fits one of the classes wherein the evidence has been recognized as having independent relevancy, then the evidence is received, otherwise not. This mechanical way of handling such questions has the advantage of calling on the judge for a minimum of personal judgment. But the problems of lessening the dangers of prejudice without too much sacrifice of relevant evidence can seldom if ever be satisfactorily solved by mechanical rules . . .

"Accordingly, some of the opinions recognize that the problem is not merely one of pigeonholing, but one of balancing, on the one side, the actual need for the other-crimes evidence in the light of the issues and the other evidence available to the prosecution, the convincingness of the evidence that the other crimes were committed and that the accused was the actor, and the strength or weakness of the other-crimes evidence in supporting the issue, and on the other, the degree to which the jury will probably be roused by the evidence to overmastering hostility."

Judge Browning recognized the above principle when, speaking for this Court, he stated in *Galvin and Ches-*

ney v. United States, ... F.2d ..... (No. 21,374, decided June 7, 1968), at page 5 of the slip sheet opinion:

> "But the task of 'balancing probative values against probative dangers' rested with the trial judge, and we are not prepared to say that his ruling exceeded the 'lee-way discretion' vested in the court in resolving problems of this kind."

Once Becker and Thomas raised the defense of entrapment (flavored with coercion) and concocted a relationship between the government agent and themselves in their testimony in a way such as to raise serious questions as to the true nature of that relationship, it became extremely relevant and probative to delve into the association in its totality. For only in such a fashion could the government establish their state of mind and rebut the contention that they were threatened, harassed, importuned, provoked and cajoled into committing the crimes charged in the indictment.

Thomas' reliance on *Devore v. United States,* 368 F.2d 396 (9th Cir. 1966) and *DeJong v. United States,* 381 F.2d 725 (9th Cir. 1967) is misplaced since the first did not involve an entrapment defense and in the latter the relevance-prejudice balancing scale was tipped heavily against the defendant.

C. There Was No Consent On The Part Of The Government To The Crimes Charged In The Indictment.

All the cases cited by Thomas in support of the proposition that the government consented to the commission of the crimes charged are entrapment

cases. As Orfield points out,[74] the kinship and the distinction between the consent defense and the entrapment defense is most readily seen in cases involving sexual offenses. In the former the consent of the government agent vitiates an element of the offense, while in the latter the defendant succumbs to the unlawful inducement of the agent. In the instant case Thomas was acting for himself, not as a subagent of the government. Thomas and Becker were producers and sellers of the illegal spirits sold to the government agent, not messengers or purchasing agents as was the case in *Adams v. United States,* 220 F.2d 297 (5th Cir. 1955) and *Henderson v. United States,* 261 F.2d 909 (5th Cir. 1959).

The evidence in the instant case established that the defendants authored the criminal design and harbored a disposition to commit the offenses for profit.[75] The offenses charged in the instant indictment were not assaults and thus the willingness of the agent to purchase the illegal alcohol is immaterial. Cf. *Guarro v. United States,* 237 F.2d 578, 582 (D.C. Cir. 1956).

D. The Holdings Of The Supreme Court In Grosso, Marchetti, And Haynes Are Inapplicable To The Instant Case.

It should be pointed out initially that only Count II of the indictment in this case charged a violation of Title 26 U.S.C. § 5601(a)(1) in that Thomas possessed a distilling apparatus setup which was not registered as required by Title 26 U.S.C. § 5179(a). The

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[74]Orfield, "The Defense of Entrapment in the Federal Courts," 67 Duke Law J. 39 (1967) at p. 53, footnote 92.

[75]See notes 12, 15, 16, 45, 51, 52, 55, and 58, *supra.*

foregoing was the only so-called "registration statute" involved in this case.

Since the Supreme Court decisions in *Marchetti v. United States,* 390 U.S. 39 (1968), *Grosso v. United States,* 390 U.S. 62 (1968), and *Haynes v. United States,* 390 U.S. 85 (1968), a few courts have had occasion to examine the applicabiltiy of the Court's holdings to the registration requirement of Title 26 U.S.C. § 5179(a). In *United States v. McGee,* 282 F. Supp. 550 (M.D. Tenn. 1968) the District Court clearly distinguished *Marchetti, Grosso,* and *Haynes* and pointed out that the requirements of the federal still registration statute are not aimed at "a highly selective group inherently suspect of criminal activities," but rather are aimed at the entire liquor distilling industry as well as states and municipalities which engage in activities connected with distilled spirits. See *State of Ohio v. Helvering,* 292 U.S. 360 (1934).

In *United States v. Richardson and Wilson* (Criminal Case No. 2416-E), decided by the United States District Court for the Middle District of Alabama (Eastern Division) on April 23, 1968,[76] the Court again distinguished *Marchetti, Grosso,* and *Haynes* and observed that the statutory scheme with respect to liquor is not to compel suspected criminals

[76]As of the time of this writing the case has not been reported in the Federal Supplement. *Richardson and Wilson* was a case decided by the Court along with *United States v. Beason, et al.* (No. 2420-E), and *United States v. Davis* (No. 2422-E), all of which arose on motions in the District Court to dismiss the indictments.

to confess their crimes, but to protect a public interest in the collection of taxes.

We would also invite this Court's attention to *Cochran v. United States,* .... F.2d ..... (10th Cir. 1968) in which a petition for certiorari was filed in the Supreme Court on April 3, 1968 (Sup. Ct. No. 1289) raising, *inter alia,* the question as to whether *Marchetti, Grosso,* and *Haynes* require remand to the district court for consideration of whether a prosecution for failure to pay the federal tax on moonshine whiskey violated the defendant's privilege against self-incrimination. See 36 LW 3445. On May 20, 1968, the Supreme Court denied certiorari. 36 LW 3438.

Furthermore, unlike the gambling cases, to register a still would not have incriminated Thomas under the law of the State of California because the operation of a still is not ipso facto illegal under California law, but rather the state merely requires registration also. That is, all the defendant had to do to avoid incriminating himself was to procure a state still license under the California Business and Professions Code, Secs. 23320(6) and 23367.

As to the other counts in the indictment, the government submits that no registration requirement exists wherein the defendant had to disclose any information, much less information which would have tended to incriminate him. The defendant's sole duty under the applicable statutes (i.e., Title 26 U.S.C. § 5205(a) and Title 26 U.S.C. § 5604(a)(1) was to refrain from transporting and selling the containers of liquor unless each bore the required tax stamp.

The omission of this duty—the performance of which would not have entailed a compulsory disclose—was the crime. In such circumstances it could hardly be said that the defendant was "confronted by substantial hazards of self-incrimination." *Marchetti v. United States,* at 61.

II. RESPONSE TO APPELLANT BECKER'S ARGUMENTS.

A. Venue Was Proper In The Instant Case And There Was No Error By Trial In The Old Northern District Of California.

Becker's argument in this regard was properly laid to rest by this Court in *Westover v. United States,* .....F.2d.....(9th Cir. No. 21,854, decided April 18, 1968). Judge Chambers therein pointed out that Title 18 U.S.C. § 3240 provides for the continuance of the old districts for the purpose of crimes committed before the effective date of a redistricting act. Here the offenses were committed prior to the redistricting date, the indictment was filed prior thereto, and the judge and jury sat as part of the old Northern District of California.

B. The Statements Of Becker Were Not Admitted In Violation Of His Constitutional Rights.

Becker argues, in substance, that since he was on probation at the time of the initial meeting with the undercover agent and for some time thereafter it was incumbent upon the agent to advise the defendant of his rights prior to engaging in conversation with him. The government submits that the above is an unwarranted extension of the *Miranda* doctrine and is unsupported by the cases. There was no custodial inter-

rogation within the purview of *Miranda* and the evidence established that the investigation continued in this case in order to locate the defendants' still apparatus. The agent was under no obligation to prevent the defendants from implicating themselves by interrupting the chain of events which they had set in motion. *Galvin and Chesney v. United States,* ..... F.2d ..... (9th Cir. No. 21,374, decided June 7, 1968, at page 6 of slip opinion). See also, *Lewis v. United States,* 385 U.S. 206 (1966), and *Osborne v. United States,* 385 U.S. 323 (1966).

C. There Was No Error In The Admission Into Evidence Of The Tape Recordings.

The first tape recording introduced into evidence was Government Exhibit B, a tape of a phone call from Agent Courtney to Becker on December 24, 1963.[77] The conversation was recorded by the use of an induction coil placed on the phone being used by Courtney and then connected by wire into a tape recorder.[78] The next recording played to the jury was a phone conversation between Becker and Courtney on January 28, 1964. The recorded conversation was contained on the same roll of tape as that of December 24, 1963 and was admitted into evidence as part of Government Exhibit B.[79]

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[77]This phone call was made after the receipt by Courtney of Becker's letter of December 16, 1963 wherein Becker advised Courtney that he (Becker) was "back in circulation" and that "it was very important that I see you." See note 11, *supra.*

[78]R.T., Vol. 3, p. 676.

[79]R.T., Vol. 3, pp. 821, 823, 824; the phone conversation between Becker and Courtney of January 28, 1964 was also recorded by use of an induction coil placed on the agent's phone. R.T., Vol. 3, p. 821.

The other two tapes which were admitted into evidence were Government Exhibits V-1 and V-2, recorded conversations between Agent Courtney, Becker and Thomas at the Hyatt House in San Jose on February 8, 1964 and at the Nugget Hotel in Sparks, Nevada on March 30, 1965, respectively.[80] The conversation at the Hyatt House was recorded by the use of a tape recorder and a subminiature radio transmitter. The transmitter was concealed in the agent's room and the conversation was broadcast to and recorded in an observation post located in a room adjoining the room occupied by the agent.[81] The conversation on the Nugget Hotel tape which was admitted into evidence (Government Exhibit V-2) and played to the jury was recorded by the use of a microphone concealed in the agent's room with a wire extending to a tape recorder in an adjoining room.[82]

With regard to the telephone conversations, the tapes were clearly admissible under the authority of *Lopez v. United States,* 373 U.S. 427 (1963); *Battaglia v. United States,* 349 F.2d 556, 559 (9th Cir. 1965); and *Todisco v. United States,* 298 F.2d 208 (9th Cir. 1961).

The tape recordings of the conversations between the agent, Becker and Thomas at the Hyatt House and Nugget Hotel were also clearly admissible under *Lopez, supra; Hoffa v. United States,* 385 U.S. 293 (1966); *Osborne v. United States,* 385 U.S. 323

[80]R.T., Vol. 8, p. 2131.
[81]R.T., Vol. 8, pp. 2115-2116.
[82]R.T., Vol. 8, pp. 2124-2125; Vol. 3, p. 751.

(1966); and *On Lee v. United States,* 343 U.S. 747 (1952). The conversations were in the agent's hotel room in both instances and there was no trespass. It is well settled that one who voluntarily communicates with another necessarily assumes the risk not only that the listener will remember and divulge the contents of the communication to others, but also that the communication may "be accurately reproduced in court, whether by faultless memory or mechanical recording." *Lopez, supra,* at 439.

Berger v. New York, 388 U.S. 41 (1967) is inapposite for the primary reason that the frailties in the New York statute were not present in the instant case. That is, there was reason to believe that a crime was being committed, and the entry into and conversations with the agent were voluntary. "Neither this Court nor any member of it has ever expressed the view that the Fourth Amendment protects a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it." *Hoffa v. United States,* 385 U.S. 293 at 302.

There is a problem, however, which has arisen in this case involving two conversations between Becker and Thomas outside the presence of Courtney. An electronic transmitting device was installed in the rooms jointly occupied by Becker and Thomas in the Hyatt House on February 8, 1964 and the Nugget Hotel on March 30, 1965. The conversations between the two which were recorded were abrupt, innocuous, and semi-unintelligible. They were not played to the jury and came to the government's attention for the

first time months after the trial of this case. The government takes the position that these tapes have no bearing on the convictions and we have advised counsel for each appellant of their existence and have offered to make them available for listening. We are at this writing awaiting the views of appellants' counsel as to whether they desire a full scale hearing on this issue in which case the government will move for a remand.

D. There Was No Entrapment As A Matter Of Law In This Case.

This issue was raised by Thomas and the government reiterates its argument in response to the appellant Becker. The evidence established that the undercover agent did no more than afford the appellants an opportunity for the continuation of a course of criminal conduct, upon which they had earlier voluntarily embarked. Cf. *Lopez v. United States,* 373 U.S. 427, 436 (1963).

The Government would also at this time respectfully invite the Court's attention to the well reasoned and definitive instruction which was given to the jury on the issue of entrapment in this case.[83]

E. There Was No Consent On The Part Of The Government To The Crimes Committed By The Appellants.

This issue again was raised by Thomas and the government reiterates its argument in response to the appellant Becker.

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[83]The entrapment instruction covers almost seven pages of transcript and is contained in R.T., Vol. 10, pp. 2682-2688.

F. There Was No Prejudicial Error In Allowing Testimony Of Other Misconduct Against Becker.

This issue was also raised by Thomas and answered in that portion of the government's Brief. However, the government again asserts that it is no answer to the problem to conclude that the questioned evidence was prejudicial. The fact standing alone that it showed that the appellants may have committed other crimes does not require its exclusion. See, *e.g., Reed v. United States,* 364 F.2d 630 (9th Cir. 1966).

This Court has recently observed that:

> "Since the evidence was properly received, it is no answer to say that it was 'prejudicial.' No doubt it hurt the defendants, but so would evidence in a murder trial that a witness saw the defendant shoot the deceased. That does not make it inadmissible on the ground that it is 'prejudicial.'"[84]

G. The Holdings Of The Supreme Court In Grosso, Marchetti, And Haynes Are Inapplicable To The Instant Case.

The Government reiterates its argument made in response to the appellant Thomas on this issue and would additionally point out that Becker was not charged under the registration count—i.e., Count II of this indictment.

III. RESPONSE TO APPELLANT GREENE'S ARGUMENTS.

A. The Testimony Relating To Greene's Possession Of Stolen Government Bonds Was Proper And Admissible In This Case.

The testimony adduced at the trial revealed that Greene told the undercover agent that he had received

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[84] *Suhl, et al. v. United States,* 390 F.2d 547 at 553 (9th Cir. 1968).

some stolen Government bonds and had given them to Becker for transmittal to the agent so that the latter could "fence" them. Furthermore, he told the agent that he intended to set up a still with his share of the proceeds and deliver the product from his still to Becker and Thomas for sale to the agent.[85]

Greene was charged in the indictment as a defendant and co-conspirator in Count I and as a joint defendant with Becker in Count III which alleged that Greene violated Title 26 U.S.C. § 5604(a)(1) by transporting, selling, and transferring tax unpaid distilled spirits. The government contends that the evidence relating to Greene's participation in the stolen bond venture was admissible to show his knowledge of the existence of the conspiracy and his knowing participation therein. Evidence of other crimes to establish knowledge and lack of mistake on the part of a defendant is proper and admissible. *United States v. Schaffer,* 266 F.2d 435 (2nd Cir. 1959); *Kowalchuck v. United States,* 176 F.2d 873 (6th Cir. 1949).

Additionally, it is respectfully submitted that the bond transaction was in furtherance of the conspiracy since the proceeds were intended to finance Greene's enlistment therein. See *Pinkerton v. United States, supra.* Again, however, even if we assumed *arguendo* that the transaction was not strictly in furtherance of the conspiracy, it was relevant to the intent and purpose of Greene in engaging in the conspiracy—i.e., to possess and have custody of a distilling appa-

[85]R.T., Vol. 3, pp. 791-792.

ratus not registered as required by law and to produce, deliver, and sell tax unpaid distilled spirits. See, e.g., *United States v. Marchisio,* 344 F.2d 653, 667 (2nd Cir. 1965).[86]

CONCLUSION

For all of the foregoing reasons we respectfully urge that the judgments below be affirmed as to each of the appellants.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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[86]The Court gave clear and exhaustive instructions to the jury with respect to the bond transaction and its relevance to Greene. R.T., Vol. 10, p. 2702.